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NTSB Order No. EA-4304

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 7th day of December, 1994

DAVID R. HINSON,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	
v.)	Docket SE-12149
)	
ROBERT ALLEN BARBER,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Respondent and the Administrator have appealed from the oral initial decision of Chief Administrative Law Judge William E. Fowler, Jr., issued on January 15, 1992, at the conclusion of an evidentiary hearing.¹ The amended order of suspension alleged in part:

¹The initial decision, excerpted from the hearing transcript and edited, is attached.

1. At all times material herein you were and are the holder of Commercial Pilot Certificate Number 499620117.
2. On or about January 17, 1990, you operated as pilot in command civil aircraft N335GP, a Cessna 404A, on a flight from Wilmington, Delaware, with the intended destination of Fort Lauderdale, Florida.
3. The flight ended in a forced landing on Interstate 95.
4. The flight was a passenger carrying flight.
5. The flight was conducted pursuant to instrument flight rules.
6. There was no valid Airworthiness Certificate onboard N335GP at the time of the flight.
7. At the time of the flight[,] N335GP did not qualify for an Airworthiness Certificate.
8. A Special Airworthiness Certificate issued to N335GP had expired on January 14, 1990.
9. The expired Special Airworthiness Certificate had certain operating limitations applicable to operations of N335GP including the following:
 - a. The carriage of cargo or persons other than the crew necessary for the purpose of the flight was prohibited.
 - b. The flight was to have been conducted under day or night Visual Flight Rules.

The law judge found that a special airworthiness certificate issued for the flight expired on January 14, 1990, and that the aircraft neither qualified for nor had aboard it a valid airworthiness certificate. With respect to the limitations in the special airworthiness certificate, the law judge found that the flight was conducted pursuant to instrument flight rules in visual meteorological conditions but there was no violation as a result thereof and that the two other persons aboard the flight

were authorized crewmembers and not passengers. The law judge further found that respondent was not careless or reckless. The law judge concluded that respondent violated sections 91.27(a)(1) (now 14 C.F.R. § 91.203) and 91.29(a) (now 91.7) of the Federal Aviation Regulations (FAR), but he did not violate sections 91.9 (now 91.13(a)) and 91.31(a) (now 91.9).² The law judge modified sanction from 90 days to a 30-day suspension of respondent's commercial pilot certificate.

Respondent argues that the law judge erred in finding that respondent operated the aircraft in a non-airworthy condition and without a current airworthiness certificate. The Administrator argues that the law judge erred in not finding violations of §§

²"§ 91.27 *Civil aircraft: Certifications required.*

(a) Except as provided for in §91.28, no person may operate a civil aircraft unless it has within it the following:

(1) An appropriate and current airworthiness certificate..."

"§ 91.29 *Civil aircraft airworthiness.*

(a) No person may operate a civil aircraft unless it is in an airworthy condition."

"§ 91.31 *Civil aircraft flight manual marking, and placard requirements.*

(a) Except as provided in paragraph (d) of this section, no person may operate a civil aircraft without complying with the operating limitations specified in the approved Airplane or Rotorcraft Flight Manual, markings, and placards, or as otherwise prescribed by the certificating authority of the country of registry."

"§ 91.9 *Careless or reckless operation.*

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

91.9 and 91.31(a).³

Upon consideration of the briefs of the parties and the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order as modified herein to provide for a 75-day suspension. As modified herein, we adopt the findings of the law judge.

The material facts are largely undisputed and fairly straightforward. The aircraft had been registered in Chile and was being imported into the United States. In order to obtain a United States airworthiness certificate, the aircraft had to be registered in the United States. This necessitated removal of the aircraft from the foreign registry which voided its airworthiness certificate. The aircraft was to be flown from Fort Lauderdale, Florida to Wilmington, Delaware, where the purchaser would take possession. The aircraft would then be flown back to Fort Lauderdale where it would receive 100-hour and annual inspections, thereby making it eligible for a United States airworthiness certificate.

Because the aircraft's foreign airworthiness certificate terminated when it was deleted from the aircraft registry of Chile, Mr. Alan Balazi, the President of the company that purchased the aircraft and respondent's employer, telephonically obtained Special Flight Permits (ferry permits) for the flights to Wilmington and return to Fort Lauderdale from an Assistant

³Both parties have filed reply briefs.

Manager in the Fort Lauderdale Flight Standards District Office.

When the initial flight was delayed for repairs, Mr. Balazi obtained an extension from the Assistant Manager until January 14, 1990. Further delays for repairs required an additional extension, and Mr. Balazi left word for the manager, who was unavailable, that he was going to extend the expiration until January 16.⁴

Mr. Bohuslav Tupy was the pilot and sole occupant of the uneventful flight on January 16, 1990, to Wilmington,⁵ which departed Fort Lauderdale later than planned because of the need for additional maintenance. Mr. Tupy was planning on purchasing a ticket for another flight and was too tired to fly back that night and would have stayed in a hotel and flown the next morning. Respondent was the pilot in command of the return flight,⁶ and he was instructed by Mr. Balazi to take Mr. Tupy

⁴Mr. Balazi believed, through his earlier dealings with the Assistant Manager, that the manager would permit him to unilaterally extend the expiration date in this fashion. The manager testified that if Mr. Balazi believed that he could so extend the ferry permit, a pilot would be entitled to rely on advice from Mr. Balazi that the permit was still in force. The manager also testified that he would have approved a request for an even longer extension if additional time were needed to perform more maintenance.

⁵Mr. Tupy was hired by the seller to deliver the aircraft to Wilmington. Mr. Tupy had previously noted that the ferry permit had expired, but he had been assured by Mr. Balazi that he had obtained an extension and that the ferry permit remained in force.

⁶One of the operating limitations of the special flight permit was a requirement that the aircraft be inspected by an appropriately certificated mechanic or repair station and that a signed logbook entry be made to the effect that the aircraft was safe for the intended flight. No such entry was made in the

back to Fort Lauderdale. Respondent informed Mr. Tupy that he would fly him back to Fort Lauderdale, and respondent advised him to rest. Mr. Tupy no longer considered himself responsible for the aircraft, and he was not involved in the flight planning or preparation for the flight back to Fort Lauderdale.

Mr. Balazi assigned Mr. Douglas Frederick, a recently-hired pilot who had 5 hours in Cessna 404s, to accompany respondent and gain experience in the aircraft. In a written statement (Ex. A-6), respondent noted that the handwritten change to the expiration date was difficult to read and he testified that he thought it indicated the 18th.⁷ The aircraft received an instrument flight rules (IFR) clearance from Wilmington to Fort Lauderdale and the flight operated under IFR (Tr. 189).⁸ Respondent accomplished the takeoff and transferred the flying duties to Mr. Frederick at 4,000 feet. Respondent verified with air traffic control the accuracy of the mode C, altimeters, and navigation instruments.

In the vicinity of their destination, one engine quit.

(..continued)

logbook; however, respondent produced an invoice reflecting certain maintenance dated January 15, 1990, and the licensed mechanic told respondent that the aircraft was in good shape and that both engines ran well. This maintenance, however, did not satisfy the requirement for the 100-hour and annual inspections.

⁷Mr. Balazi conceded that his handwritten change to the typed expiration date appears to reflect January 14, 1990 (Tr. 222-223), but he had assured respondent that the ferry permit was still in effect on January 16.

⁸Respondent was instrument rated. The Administrator stipulated that visual meteorological conditions prevailed throughout the flight.

Respondent took control and less than a minute later the other engine quit. Respondent instructed Mr. Frederick to change seats with Mr. Tupy, who had slept for most of the flight. Mr. Tupy checked the position of the fuel mixture, propeller controls, and power levers and found all of them in the correct, forward position. Respondent asked Mr. Tupy if he thought they could make it to Pompano Beach Airport, and Mr. Tupy said no, and advised him to land on the highway. At about 1:00 a.m. on January 17, respondent executed a difficult landing on an uncompleted bridge in the median of I-95. The three occupants of the aircraft received no or only minor injuries, but the aircraft sustained substantial damage.⁹

The ferry permits represented special airworthiness certificates, and without a valid ferry permit, the aircraft could not be legally operated at all since it was not airworthy by U.S. standards. The alleged violations regarding the airworthiness of the airplane are premised on the expiration of the ferry permit. Although Mr. Balazi did not directly confer with the FAA Assistant Manager for the second extension to the 16th, the Administrator does not contend that respondent could not rely on Mr. Balazi's assurance that the permit was valid for the 16th. Nevertheless, a small portion of the flight was conducted after January 16, 1990, during which the aircraft did not have a current, valid airworthiness certificate, and

⁹The Administrator did not allege any deficient action or inaction on respondent's part in causing the engines to quit or in executing the forced landing.

respondent had not been advised by anyone that the ferry permit covered anytime beyond January 16.¹⁰ We, therefore, affirm the law judge's findings of violations of §§ 91.27(a)(1) and 91.29(a).

The operating limitations for the ferry permit mandated that the flight be conducted "DAY VFR, NIGHT VFR." The law judge found that the flight was conducted pursuant to instrument flight rules in visual meteorological conditions, but without giving any specific reasons, concluded that there was nevertheless no violation as a result thereof. The operating authority for the special airworthiness certificate explicitly confined the flight to VFR, and respondent violated an express term of the certificate by operating IFR.¹¹ Respondent may well have felt safer operating under instrument rules, but this is no defense to this charge. The Administrator's responsibility extends beyond respondent's self-interest, embracing the safety of all flights lawfully conducted under IFR as well as VFR, and we see no basis for differing with the Assistant Manager's determination that an aircraft of uncertain airworthiness should be operated outside

¹⁰The operating limitations for the special ferry flight stipulate that "The Special Airworthiness Certificate, of which these Operating Limitations are a part, expires upon arrival at the destination or _____ which ever occurs first." This language defeats any suggestion that the flight need only be commenced and not completed before the specified expiration date.

¹¹The existence of visual meteorological conditions does not in any way change the fact that the flight was conducted, as alleged, pursuant to IFR procedures.

the IFR environment.¹²

The other operating limitation at issue prohibited the carriage of persons other than the crew necessary for the purpose of the flight. The law judge found that the two other persons aboard were crewmembers. We disagree. Even if we were to find that Mr. Frederick was a necessary crewmember, a finding as to which there is opposing evidence in the record,¹³ the Administrator established the allegation that this was a passenger-carrying flight as to Mr. Tupy. At the outset of the flight, there is no indication that there was a mutual agreement or understanding that Mr. Tupy would be acting as a crewmember for any portion of the flight. On the contrary, Mr. Tupy testified that he was too tired to conduct the return flight, and he in fact slept for most of the flight. That respondent unexpectedly called upon Mr. Tupy to occupy the right front seat for a few minutes does not convert his earlier status as a passenger to a necessary crewmember. Therefore, we find that respondent violated § 91.31(a) as to both operating limitations set forth in the complaint.¹⁴

Turning to sanction, we have affirmed all of the alleged

¹²In order to qualify for an airworthiness certificate, the airplane needed a 100-hour and an annual inspection.

¹³The standard type certificate reflects that the minimum crew is one, and Mr. Tupy was the sole pilot for the reciprocal flight from Florida to Delaware.

¹⁴The § 91.9 charge was not pled or tried as an independent violation and no additional sanction will be assessed as to it for we are treating it as residual to the other violations.

charges whereas the law judge upheld two of the four regulatory violations. We generally defer to the Administrator's selection of sanction when all of the alleged violations have been affirmed, but we believe that a slight reduction in sanction is warranted.

The Administrator alleged and the law judge found that the ferry permit expired on January 14, 1990, and the law judge applied a 30-day suspension for the resulting airworthiness violations. The Administrator, however, does not take exception to respondent's reliance on the assurance of Mr. Balazi that the ferry permit was valid for January 16th. Thus, and unlike the conduct alleged in the complaint, respondent's flight did not commence the second day after the permit expired. Instead, the flight began when the ferry permit was considered to be still in force and exceeded the expiration by about 1 hour. Under these circumstances and since approval of an additional extension would have been pro forma, this violation is not as significant as alleged in the complaint and would warrant a relatively short suspension.

The remaining violations we are affirming are more serious. Respondent violated not one but two of the operating limitations governing flight under the ferry permit, i.e., operating IFR contrary to the VFR limitation, and carrying at least one person who was not a necessary crewmember. These two violations, of course, would have been established even if the ferry permit had not expired. In light of respondent's failure to abide by

express conditions incorporated in the ferry permit and the operation of the aircraft after the ferry permit expired, a 75-day suspension is in our view appropriate, and respondent has presented us with no persuasive reason to reduce the sanction any further.¹⁵

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted in part and denied in part;
2. Respondent's appeal is granted in part and denied in part;
3. The initial decision is modified as set forth in this opinion; and
4. The 75-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.¹⁶

HALL, Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹⁵Respondent contends that no sanction should be imposed for a violation which is inadvertent and not deliberate, citing Administrator v. Ferguson and Bastiani, 3 N.T.S.B. 3068 (1980), *aff'd sub nom. Ferguson v. NTSB*, 678 F. 2d 821 (9th Cir. 1982). The Ferguson case involved the sanction immunity provisions of the Aviation Safety Reporting Program, and respondent has made no showing that he initiated the requisite filing which would have entitled him to the benefits bestowed by that program.

¹⁶For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to 14 C.F.R. § 61.19(f).